NO. 83-5644

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1983

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SUPREME COURT U.S.

ANTHONY ANTONE,

Petitioner,

-v-

CHARLES G. STRICKLAND, JR., Superintendent, Florida State Prison, LOUIE L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation, State of Florida; JIM SMITH, Attorney General, State of Florida,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the principles of Payton v. New York, should be applied retroactively to a case raising the issue for the first time on collateral review or whether the federal courts are barred under Stone v. Powell, from considering the Payton v. New York issue?

2. Whether petitioner was denied the effective assistance of counsel at the sentencing phase of his capital trial by counsel's failure to present evidence in mitigation, by counsel's failure to present other mitigating circumstances outside the statutorily prescribed factors, by counsel's failure to adequately or effectively present argument during the penalty phase or by counsel's failure to request special jury instructions to clear up deficiencies in the standard jury instructions?

3. Whether in the application of the especially heinous, atrocious and cruel aggravating factor to petitioner's case, the State of Florida had used such a vague and overbroad construction of the factor that the Eighth and Fourteenth Amendments are violated?

4. Whether the failure of the State to comply with the requirements of Brady v. Maryland, and United States v. Agurs, by failing to disclose the existence of a relevant witness thereby precluding petitioner from having a witness to testify in the penalty phase of his capital trial as to the circumstances of the offense denied petitioner his Eighth and Fourteenth Amendment rights?

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Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Petitioner, ANTHONY ANTONE, prays that the writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit filed June 13, 1983. Rehearing was denied on September 6, 1983.

CITATIONS TO OPINIONS BELOW

The opinion of the court of appeals is reported at 706 F.2d 1534 (11th Cir. 1983), and is set out at pages 1a-16a of the Appendix.*/

JURISDICTION

The judgment and opinion of the court of appeals were filed on June 13, 1983, and petitioner's timely petition for rehearing was denied on September 6, 1983. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

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*/ Citations to the Appendix accompanying this petition are designated App. ___.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth Amendment to the United States Constitution which provides in relevant part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . .;

the fifth amendment to the Constitution which provides in relevant part:

> . . . nor shall [any person] be compelled in a criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . .;

the sixth amendment to the Constitution which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance for his defense;

the eighth amendment to the Constitution which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the fourteenth amendment to the Constitution which provides in relevant part:

> [Nor] shall any State deprive any person of life, liberty or property, without due process of law . . . .

It also involves Section 921.141, Florida Statutes (1975), which is set out at App. 17a, 18a.

STATEMENT OF THE CASE

A. Course of Prior Proceedings

Petitioner was convicted of the first degree murder of Richard Cloud in the Circuit Court of the Thirteenth Judicial Circuit for Hillsborough County, Florida, on August 27, 1976. (Tr 1878). Immediately following the return of the guilty verdict, the court proceeded with the penalty phase. The jury returned a recommendation of death. The trial judge followed the jury recommendation and immediately imposed

the sentence of death. (Tr 1886-1927).[1/]

On February 16, 1978, the Supreme Court of Florida remanded petitioner's cause to the trial court for a determination of whether there had been a Brady v. Maryland, 373 U.S. 220 (1963) violation committed by the State prior to or during petitioner's trial. Antone v. State, 355 So.2d 777 (Fla. 1978). App. 19a, 20a.

Subsequent to a hearing in the trial court, in which no Brady violation was found, the Florida Supreme Court affirmed petitioner's conviction and sentence of death on March 27, 1980. Antone v. State, 382 So.2d 1205 (Fla. 1980). App. 21a-32a. Certiorari was denied on October 14, 1980. Antone v. State, 449 U.S. 913 (1980).

On September 29, 1980, petitioner joined with other death-sentenced defendants in an application for extraordinary relief and Petition for Writ of Habeas Corpus filed in the Florida Supreme Court. The issue raised involved the ex parte review by the Florida Supreme Court of psychological reports and other prison generated evaluations of death-sentenced inmates. Relief was denied on January 15, 1981. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). This Court denied Certiorari on November 2, 1981. Brown, et al. v. Wainwright, 454 U.S. 1000, 102 S.Ct. 542 (1981).

On January 6, 1982, the Governor of Florida signed a Death Warrant requiring petitioner's execution between January 29, 1982 and February 2, 1982.

1/ References to the various portions of the record relevant to this proceeding are designated as follows:

"Tr" shall refer to transcript of the trial in the Circuit Court for the Thirteenth Judicial Circuit of Florida; held August 23, 1976 through August 27, 1976.

"RPC" shall refer to the record on appeal to the Supreme Court of Florida following the denial of post-conviction relief.

"R" shall refer to orders of the District Court and other documents filed in the District Court.

On January 15, 1982 and January 20, 1982, petitioner's trial counsel and volunteer counsel filed two separate motions for post-conviction relief pursuant to Fla.R.Crim.P. 3.850. The Circuit Court in Hillsborough County, Florida denied both motions. App. 33a-41a. This ruling was affirmed by the Florida Supreme Court on January 28, 1982. The court also denied a motion for stay of execution and petition for writ of error coram nobis. Antone v. State, 410 So.2d 157 (Fla. 1982). App. 42a-48a.

On January 22, 1982, petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court, for the Middle District of Florida, Tampa Division. App. 49a-75a. The district court denied the petition on January 29, 1982 by oral order. App. 76a-113a.

An appeal to the United States Court of Appeals for the Eleventh Circuit was immediately filed. On February 1, 1982, the Court of Appeals granted a Stay of Execution pending a remand to the district court for more complete findings of fact and conclusions of law. (Order unreported). App. 114a-116a. A Memorandum of Decision was thereafter entered on February 18, 1982. App. 117a-140a.

On June 13, 1983, a panel of the Eleventh Circuit affirmed the District Court's denial of relief.[2/] Antone v. Strickland, 706 F.2d 1534 (11th Cir. 1983). App. 1a-16a. Rehearing was denied on September 6, 1983. App. 142a.

B. Facts Relevant to the Questions Presented

This petition seeks review of several important constitutional issues which have yet to be resolved by this Court. Petitioner initially challenges the applicability of this Court's ruling in Stone v. Powell, 428 U.S. 465 (1976) to issues raised on collateral attack by a undeniable Fourth Amendment violation under Payton v. New York, 445 U.S. 573 (1980). Petitioner also raises an issue regarding Sixth Amendment rights to effective assistance of counsel during the penalty phase of his bifurcated

2/ Although the Court affirmed the District Court's denial of relief, it remanded the case for consideration of the effect

murder trial. Petitioner also challenges the constitutionality of his sentence and the constitutionality of Florida's capital punishment statute which includes as an aggravating factor, that "the capital felony was especially heinous, atrocious and cruel", a factor which has been made unconstitutionally vague and overbroad through its application and construction by the Florida Supreme Court. Finally, petitioner challenges the court of appeals ruling on a Brady v. Maryland, supra, issue as it relates to Eighth Amendment issues concerning jury consideration of all relevant circumstances of the offense and aspects of the defendant's character. These issues raise questions of constitutional significance which have not yet been answered by this Court. The facts giving rise to each of these issues are set forth seriatim.

(1) Petitioner challenges whether he is precluded under the principles of Stone v. Powell, supra, from collaterally asserting issues raised by an illegal, warrantless arrest in his home contrary to Payton v. New York, supra.

Richard Cloud, a suspended police officer with the Tampa Police Department was shot to death in his home on October 23, 1975. A task force of local law enforcement, F. B. I. and Florida Department of Law Enforcement was formed to investigate the murder. (RPC 140, 141). During the course of the investigation, members of the task force came into contact with a Robert Bruns. The first contact with Bruns was on February 20, 1976. (RPC 204). Bruns had been arrested for contempt of court and was incarcerated. While in jail, Bruns contacted the police and informed them that he had information regarding the Cloud murder. (RPC 181, 182). Bruns was taken out of jail by the police. Bruns related to the police that a Benjamin Gilford had been living with him in February 1976. (RPC 166).

2/ continued. case. When the United States Supreme Court entered its opinion in Barclay, 103 S.Ct. 3418 (1983), the Eleventh Circuit granted the State's petition for rehearing to amend the language of the original opinion to conform to the Barclay decision. Antone v. Strickland, ___ F.2d ___, (1983). App. 141a.

During conversations with Bruns, Gilford had explained to him how Cloud had been murdered. (RPC 169). Essentially, Gilford related that he had been with a Marlow Haskew; that Haskew had driven the car; that Gilford had gone up to Cloud's door and when Cloud answered the door, Gilford shot Cloud several times. (RPC 170). Based on this initial conversation with Bruns, Bruns agreed to work with the task force. He was equipped with a body bug by the F.B.I. . (RPC 147, 220, 221). Subsequent conversations were tape recorded on February 21, 22 and 23, 1976 by the F.B.I. . (RPC 220, 221).

Subsequent to the making of the tape recorded conversation, Benjamin Gilford was arrested. The arrest for escape, occurred on February 23, 1976. In his possession at the time of his arrest, was an address book with the name "Anthony" and a phone number. A check of phone records indicated the number was for an Anthony Antone. (RPC 213). The task force had earlier been informed that an "Anthony" was the go-between on the murder and that "Anthony" had supplied the gun and a silencer. (RPC 210).

After Gilford's arrest, members of the task force spoke with him regarding the shooting. On February 24, 1976, he confessed to the homicide. (RPC 218). On February 25, 1976, members of the task force spoke with Marlowe Haskew in Miami, Florida, after his arrest on an attempted burglary charge. (Tr 212, 217, 219). Ultimately, Haskew agreed to cooperate and his brief initial statement implicated the petitioner as a go-between on several "contracts" put out by a Victor Acosta of Tampa. (Tr 276). These "contracts" included the "hit' on Cloud. (Tr 283-286). Haskew indicated that petitioner had supplied the murder weapon and after the murder had help dispose of it by throwing it into Tampa Bay. (Tr 284). Petitioner also promised payment on the contract. (Tr 284). At the direction of law enforcement, Haskew then placed a phone call to petitioner and gave petitioner a coded message. Pursuant to this coded message, petitioner returned a call to Haskew in Miami. During

this conversation, the Cloud murder was mentioned. (Tr 292-295). Both of these calls were recorded by law enforcement,[3/] and petitioner was surveilled going to a pay phone and making a call.

On the basis of this information, a decision was made to arrest the petitioner. Shortly after Haskew's initial statement on February 25, 1976, petitioner was arrested. (Tr 300). The arrest of petitioner took place during the evening hours while he was inside his home in Tampa, Florida. The arrest was effected by members of the task force confronting the petitioner at gunpoint and forcibly entering his residence. (RPC 254, 255). The task force never obtained an arrest warrant authorizing petitioner's arrest. (RPC 289, 290).

Subsequent to the petitioner's arrest, he was transported to the F.B.I. office in Tampa, Florida. After advising petitioner of Miranda, several officers proceeded to interrogate him. (Tr 1585). Although petitioner never admitted any involvement in the homicide (Tr 1597) he did make incriminating statements. For instance, petitioner denied knowledge of two telephone calls, one between he and Gilford and one with Haskew, which the police knew had in fact occurred. (Tr 1588). Additionally, during the interview, the F.B.I. agent interrogating the petitioner placed a phone call to Miami and spoke with Marlowe Haskew. When petitioner was placed on the phone with Haskew, his chief accuser, he kept repeating, "Marlowe, why did you do this to me? Marlowe, why did you do this to me?" (Tr 1588). During the interrogation, petitioner was taken to Tampa General Hospital complaining of chest pains. (Tr 1592). At the hospital; after it had been established that petitioner knew Haskew and Victor Acosta, petitioner asked if they expected him to testify against

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3/ Subsequently, Marlowe Haskew gave a much more detailed statement regarding the Cloud murder, including much greater detail concerning the petitioner. At petitioner's trial, Haskew was the chief witness for the prosecution. (See, Tr 1453-1490).

these "other people." (Tr 1983). Petitioner informed the agents that "he was 100% Sicilian and Sicilian's do not fink." Each of these statements was relied upon by the prosecution to show that petitioner had lied about his lack of involvement in the offense.

Petitioner's trial counsel did not raise the Payton v. New York, supra, issue in his motion to suppress. App. 143a, 144a. Subsequently, it was agreed by all parties that the law in Florida at the time of petitioner's arrest was to the contrary. See, Perez v. State, 277 So.2d 778 (Fla. 1973), wherein the Florida Supreme Court ruled that police could enter a house and arrest without a warrant. (RPC 333).

The Payton issue was raised for the first time in petitioner's 3.850 motion for post-conviction relief filed January 20, 1982. App. 145a-171a. The Circuit Court for the Thirteenth Judicial Circuit denied relief on this ground for the reason that Payton could not be given retroactive application. App. 41a. On appeal to the Florida Supreme Court, the court ruled that Payton was not a change of law which required retroactive application. App. 48a.

In federal District Court, petitioner again asserted the Payton issue. The issue was raised in the context of a Fourth, Sixth and Fourteenth Amendment violation of petitioner's constitutional rights. App. 49a-75a. The district court rejected this claim. In its initial ruling announced orally from the bench the court ruled that since "the State had provided a statutory mechanism for the consideration of such a claim, this claim being a Fourth Amendment claim, and I think Stone v. Powell is supportive of that. In addition, the court has not found any binding authority that the Payton ruling is retroactive . . . and it should not be applied retroactive." App. 80a, 81a. In its subsequent memorandum decision, the court ruled that the court was precluded from considering the merits of the claim under Stone v. Powell, supra. This

was due to the court's finding that petitioner had had an opportunity for hearing on the matter in the state court. App. 121a.

In his brief to the Eleventh Circuit, petitioner again asserted that Payton should be given retroactive application. Petitioner further asserted that Stone v. Powell had no application under circumstances where the law in the State of Florida was contrary to Payton at the time of petitioner's case. Relying on language in Townsend v. Sain, 372 U.S. 293, 317 (1963), petitioner argued that he had not had an opportunity for a full and fair hearing on this issue due to the status of Florida law at the time and the fact that it was unrealistic to expect trial counsel to anticipate such a drastic change in the law. App. 172a-176a.

The Eleventh Circuit affirmed the ruling of the District Court. The Court acknowledged that under United States v. Johnson, ___ U.S. ___, 102 S.Ct., 2579 (1982), Payton was given retroactive application. Although the Court in Johnson did not address the retroactive reach of Payton to those cases which could still raise Fourth Amendment issues on collateral attack, the Eleventh Circuit ruled that it was nevertheless barred from consideration of the issues under Stone v. Powell. App. 7a, 8a.

(2) Petitioner challenges whether he was denied his Sixth Amendment right to effective assistance of counsel during the penalty phase of his trial.

Petitioner has alleged that trial counsel's performance during the penalty phase of his first degree murder trial was ineffective for numerous reasons. Under Florida's bifurcated procedure for the trial of capital cases, a separate sentencing hearing is held upon conviction. App. 17a. The sentencing phase of petitioner's trial was held immediately after the jury verdict of guilty. (TR 1882-1886). Under Florida's procedure, the penalty phase includes an evidentiary portion, arguments

of counsel and instructions on the law. App. 17a, 18a.

The entire evidentiary portion of petitioner's penalty phase is herein set out.[4/]

> . . . At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors in aggravation and in mitigation which you may consider.
>
> You may begin, counsel.
>
> MR. BOWDEN: Thank you, Your Honor. May it please the Court, the State offers into evidence as part of its aggravation, a certified copy of the file pertaining to this defendant from the Department of Offender Rehabilitation of the State of Florida.
>
> THE COURT: Very well. Any objection?
>
> MR. ALFONSO: None, Your Honor.
>
> THE COURT: None? All right. Let it be received in evidence.
>
> MR. BOWDEN: Your Honor, that is the only evidence which the State, additional evidence, I should say, the State will present in aggravation.
>
> THE COURT: All right. Defense?
>
> MR. ALFONSO: Your Honor, the defense intends to put on no evidence in mitigation other than the exhibit which the State has introduced.
>
> THE COURT: It is my understanding that you both are stipulating that it be introduced into evidence inasmuch as you each feel, you, of course, feel there are sufficient aggravating circumstances contained in that file and then you, gentlemen, the defense, feel there are some mitigating circumstances to be considered by the jury in that file as well, correct?
>
> MR. ALFONSO: That's correct, sir.
>
> THE COURT: Then you rest?
>
> MR. BOWDEN: Yes, sir.
>
> THE COURT: And you rest; is that right?
>
> MR. ALFONSO: That's correct, sir.
>
> THE COURT: Then you may make your closing arguments. (Tr 1887-1889) App. 181a-183a.

4/ The entire transcript of the penalty phase of petitioner's trial is reproduced in the Appendix, pages 177a-222a.

Trial counsel did not put on a single witness to testify on behalf of the petitioner. The only evidence introduced was petitioner's file from the Florida Department of Correction. Although this was introduced as a State exhibit in aggravation, it was introduced in effect by stipulation of both parties. (Tr 1888). App. 182a.

The court then proceeded with arguments of counsel. Counsel for the State presented argument which concentrated almost exclusively on the aggravating and mitigating factors set out in Chapter 921.141, Florida Statutes (1975). App. 18a. Under the prosecutor's argument, there were four aggravating factors applicable to petitioner and no mitigating factors. App. 183a-193a. After concluding that no mitigating factors applied, the prosecutor informed the jury, "Those are the only mitigating factors under the statute. This defendant does not qualify for one mitigating factor, not one. He qualifies under four of the statutory aggravating factors." id. at 190a. The argument that these were the only mitigating factors was highly misleading. On the one hand, they were the only factors enumerated in the statute. However, they were not in fact an all inclusive list of those mitigating factors which the jury was entitled to consider.

Petitioner's counsel totally failed to counter the State's presentation that clearly indicated that the process of deciding the question of life or death was one of <u>counting</u> aggravating and mitigating circumstances. Counsel for petitioner used the same format as the prosecutor and confined himself to a review of the statutory aggravating and mitigating circumstances. App. 193a-208a.

The argument makes no reference to non-statutory mitigation at all. In fact, there is no indication anywhere in these proceedings that counsel was aware that he could argue outside of the statutory factors. A good indication that counsel was not aware of this occurs when counsel attempts to argue

disparity of sentence in support of the mitigating factor, "that the defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the defendant's participation was relatively minor." App. 203a. Counsel should have argued it as nonstatutory mitigation.

Following arguments of counsel, the court instructed the jury. Petitioner's counsel neither presented nor requested any special jury instructions which could have corrected the limiting nature of the standard instructions. App. 208a-216a.

The District Court rejected this claim. App. 128a-133a. At the outset the district court indicated that petitioner had failed to meet his burden on the ineffective assistance claim because "plaintiff's counsel refused to let trial counsel testify at the evidentiary hearing." id. at 128a. The district court ruling, however, fails to recognize that at the outset, petitioner's counsel, who was volunteer counsel and only recently in the case, requested a continuance of the hearing to allow time for discovery and preparation for the hearing. (RPC 237-246). The motion was denied. (RPC 251). Such additional time was necessary to obtain witnesses and prepare any such presentation. Additionally as recognized by the district court, one of the petitioner's two trial attorneys was presenting one of the two motions for post-conviction relief. When that attorney/witness was called by the State of Florida on the question of ineffective assistance he refused to testify at all. App. 128a, n.7. Petitioner had asserted in the district court that he was effectively denied a fair hearing in the State court. He requested an evidentiary hearing on the matter in the district court as well. This request was denied. App. 128a. On the merits of the issue, the district court found that taken as a whole, trial counsel did not fail to render effective assistance of counsel. App. 132a, 133a.

The Eleventh Circuit affirmed the district court's ruling, although two members of the panel differed in their reasons.

The majority of the panel simply held that upon "review of the district court's findings and the record on appeal, we must agree with the district court and reject petitioner's claim of ineffective assistance of counsel." App. 7a. The third member of the panel, in a special concurring opinion, analyzed each of the allegations of ineffectiveness after finding that there was no need for an evidentiary hearing, since even if the state court hearing was insufficient, the issues raised could be resolved by reference to the existing record. App. 14a-16a.

On the question of ineffective assistance of counsel during the penalty phase, Judge Kravitch, stated:

> Under the standards set forth in Washington v. Strickland, 693 F.2d 1243 (5th Cir. Unit B, 1982) (en banc); the failure of counsel to introduce the above evidence would, in my view, come close to ineffectiveness. However, even if ineffectiveness is assumed, the record shows the absence of any "actual and substantial disadvantage to the course of his defense." Id., at 1253. App. 16a.

In support of this conclusion, Judge Kravitch, stated:

> Under this court's analysis in Ford v. Strickland, 696 F.2d 804, 812, we now assume that arguments to the jury in the penalty phase will be considered by the jury as mitigating evidence even though the jury was never instructed that they could consider the underlying evidence on which those arguments are based. App. 16a.

Since counsel had argued the evidence of disparity of sentence to the jury, he "cannot claim to be prejudiced by virtue of the failure to introduce more evidence on the same point." App. 16a.

On the failure to call family members or on the fact of the previous brain surgery, Judge Kravitch ruled that since petitioner failed to demonstrate how these matters, assuming their ineffectiveness, disadvantaged the petitioner he had failed to meet his burden of proving "actual and substantial disadvantage" under Strickland, supra. App. 16a.

The court did not analyze the effect of the denial of a full and fair hearing claim as it related to the failure of petitioner to meet the three pronge test of Washington v.

(3) Petitioner's broad based challenge to the constitutionality of Florida Capital Punish- Statute which includes as an aggravating factor that "the capital felony was especially heinous atrocious and cruel", a factor which has been made unconstitutionally vague and overbroad by the Florida Supreme Court.

The trial judge's written findings in support of the death sentence indicate in pertinent part, App. 223a-227a, "4. The premeditated murder of Detective Sgt. Cloud was particularly a heinous, cruel and vicious crime." The trial judge provided no factual basis for his conclusion that this aggravating factor applied. (Tr 926-928). App. 223a-225a.

Nothing in the trial court record would support the finding that the murder was in fact heinous, atrocious and cruel.[5/] The testimony at trial relating how the murder occurred came from Marlowe Haskew, a co-defendant, who learned the information from Benjamin Gilford,

> Q. Marlowe Haskew, after Richard Cloud was killed, did you ever have a conversation with Buck or Benjamin Gilford concerning what happened when he went to the Cloud home?
>
> A. Yes. . . . He said, "when you let me out, I walked down to the house, in front of the house, and when I approached the house and knocked on the door," he said, "a man came to the door and I was in the process of asking him if Mr. Turner lived there." He said, I fired 3 or 4 shots through the door." And he said the man started to back away like he wasn't vitally hit and he said "I opened the door and went in." And he said, the man was reaching for a potted plant or ashtray or something and he said he threw it at him and he emptied the gun." (Tr 1497, 1498).

This factor was challenged on direct appeal to the Florida

5/ In State v. Dixon, 283 So.2d 1 (Fla. 1973), Florida's Supreme Court defined the term "especially heinous, atrocious and cruel" as follows: . . . it is our interpretation that heinous means extremely wicked and vile; and that, cruel menas designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the sufferings of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily tortuous to the victim. id, at 9.

Supreme Court. In examining this particular factor, the court stated, "Because of our recent decisions, there may be a question whether this is an appropriate aggravating circumstance." See, e.g., Cooper v. State, 336 So.2d 1133 (Fla. 1976). App. 32a.

The court further stated:

> Because we fully approve the first three aggravating circumstances and find no mitigating circumstances, it is not necessary to consider the appropriateness of the trial court's finding the murder was heinous, atrocious or cruel. An error in finding this aggravating circumstance does not invalidate the imposition of the death sentence. Elledge v. State, 346 So.2d 998 (Fla. 1977). . . . App. 32a.

In his petition for writ of Habeas Corpus, petitioner challenged the constitutionality of the Florida death penalty statute on the basis of the Florida Supreme Court's inconsistent and overbroad construction of this aggravating factor. App. 71a, 72a. The District Court denied relief.

In its Memorandum of Decision, the district court stated,

> The petitioner has also asserted that aggravating factor (h), i.e., that the crime was "especially heinous, atrocious or cruel", is void for vagueness and could not properly support imposition of the death sentence. If this had been the only aggravating factor found by the trial court, it would be necessary to consider the merits of the petitioner's "void for vagueness" argument. In this case, however, the Court found three other aggravating factors and no mitigating circumstances. Therefore, the unconstitutionality of this one aggravating factor would not invalidate the petitioner's death sentence. Accord, Antone v. State, 382 So.2d 1205, 1216 (Fla. 1980). App. 139a.

In his brief to the Eleventh Circuit, petitioner contended that though Florida's capital punishment statute, including this factor was initially upheld against an attack for vagueness and overbreadth, subsequent application and construction of the term by the Florida Supreme Court had rendered the factor vague and overbroad. Petitioner argued that the factor no longer channeled the sentencing decision of juries and no longer provided a meaningful basis for distinguishing those few cases in which a death sentence is imposed from the many

in which it is not, citing, Furman v. Georgia, 408 U.S. 238 (1972); Gregg v. Georgia, 428 U.S. 153 (1976) and Godfrey v. Georgia, 446 U.S. 420 (1980). Petitioner, thus argued that the factor was unconstitutionally vague and overbroad and the sentencing could not stand. App. 228a-233a.

The Eleventh Circuit did not consider this broad based attack on the constitutionality of the heinous, atrocious and cruel factor. Instead, the court viewed the matter as one involving the invalidation on non-constitutional grounds of one of several aggravating factors in the absence of mitigating factors. Relying on its opinion in Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983) (en banc), the court declined "to engage in the collateral review of a factor upon which the affirmance of Antone's death sentence was not predicated." However, upon this issue the court remanded the case to the district court to consider the effect of the Supreme Court's ruling in Barclay v. Florida, supra, upon the petitioner's case. App. 6a. After the United States Supreme Court ruled on the issue, Barclay v. Florida, 103 S.Ct. 3418 (1983), the court substituted language from that opinion in its original opinion. In essence, the court ruled that the Florida Supreme Court was capable of evaluating the balance struck by the trial court and deciding "that the elimination of an improperly considered aggravating circumstance could not possibly affect the balance." App. 141a.

(4) Petitioner challenges the court of appeals ruling on a Brady v. Maryland, supra, issue as it relates to Eighth and Fourteenth Amendment issues concerning jury consideration of all relevant circumstances of the offense and aspects of the defendant's character during penalty phase of a first degree murder case.

After the shooting of Richard Cloud, a task force of local, state and federal law enforcement agents and prosecutors began investigating the murder. (RPC 140, 141). On February 20, 1976, members of this task force were contacted by a Robert Bruns. (RPC 204). Bruns was in jail at the time for contempt

of court. He contacted members of the task force and informed them that he had information regarding the Richard Cloud murder. (RPC 181, 182). Bruns informed the police that a Benjamin Gilford had been living with him during February 1976. In conversations with him, Gilford had admitted killing Cloud. (RPC 147, 169). Essentially, Gilford had admitted that he and a Marlowe Haskew had gone to Cloud's neighborhood; and that Gilford had gone up to Cloud's door and shot Cloud several times when he answered the door. (RPC 170). After giving this information to the police, Bruns was taken from jail. He agreed to cooperate with the police. As part of this cooperation, he was equipped with a body bug transmitter by the F.B.I. . (RPC 148, 220, 221). Bruns was instructed by the task force to get Gilford to talk about the murder. The police also instructed Bruns to find out more about an individual named "Anthony" who had previously been mentioned by Gilford as the person who had delivered the money after the shooting. (RPC 150, 152).

Benjamin Gilford was arrested on February 23, 1976. In his possession at the time of his arrest was an address book with the name "Anthony" and a phone number in it. A check of phone records indicated that the phone was for an Anthony Antone in Tampa, Florida. (RPC 213). Marlowe Haskew was arrested on February 25, 1976. Haskew agreed to cooperate and in a statement made to the police he implicated petitioner as a "go-between" on several "contracts" put out by a person named Victor Acosta. (Tr 276). Antone was identified as having supplied the murder weapon and money from Acosta for the killing. (Tr 284). Antone was arrested on the evening of February 25, 1976. (Tr 300).

An Indictment was returned against the petitioner on February 26, 1976. Subsequent to the filing of the murder charge, petitioner's trial counsel filed a demand for discovery under Florida Rule of Criminal Procedure 3.220. App. 234a-236a.

Among the demands made in this pleading were:

> 1. The names and addresses of all persons known to the prosecutor to have information which may be relevant to the offense charged, and to any defense with respect thereto.
>
> 2. The statement, including police reports of any person whose name is furnished in compliance with the preceding paragraph. The term "statement" as used herein means a written statement made by said person and signed or otherwise adopted or approved by him or stenographic, mechanical, electrical or other recording, or a transcript thereof, or which is a substantially verbatim recital of an oral statement made by said person to an officer or agent of the State and recorded contemporaneously with the making of such oral statement.
>
> 13. Pursuant to RCrP 3.220(a)(2) and to the due process clause of the Fourteenth Amendment of the United States Constitution, any material or information within the State's possession or control which tends to negate the guilt of the defendant as to the offense charged, or to punishment, or to the credibility of the State's witnesses.

This demand for discovery was reviewed by the prosecutor and the prosecutor acknowledged that it contained a demand for Brady material. (RPC 225). The prosecution did not comply with these demands and never turned over the name of Robert Bruns to the petitioner's attorney. (RPC 226). The prosecution acknowledged the availability of Bruns and acknowledged that they were not trying to keep him as a confidential informant. (RPC 227). The prosecutor also indicated that it was a deliberate decision on his part not to reveal the name of Bruns to petitioner's attorney based on his opinion that Bruns was not relevant to petitioner's case, his testimony was inadmissible as to petitioner and he had no exculpatory information regarding the petitioner. (RPC 229).

At the hearing on petitioner's motion for post-conviction relief before the Circuit Court in and for Hillsborough County, Florida, Bruns testified that in his conversations with Gilford, Gilford indicated that he had actually shot the victim, and that Marlowe Haskew had supplied the gun and driven him to the scene to do the shooting. (RPC 171, 150). Gilford had indicated that petitioner was the man who had delivered the

money to Haskew. (RPC 150). Gilford further indicated that at the time he killed Cloud, petitioner didn't know about it. (RPC 151). Gilford also related to Bruns that "on the day after, following the killing, then, that Anthony was supposed to pay him and that when he found out, you know, about it, he wouldn't pay him; that he was scared to meet with him and he was really upset about the whole thing." Antone did not know of the killing until after the shooting. (RPC 153). Bruns indicated that after Gilford's arrest he was advised by the police to leave the state of Florida and Bruns in fact moved to North Carolina. Subsequently, he met with the prosecutor on two occasions to discuss the case. (RPC 154). Bruns also indicated that he never told anyone in law enforcement that Gilford had told him that Antone did not know anything about the Cloud murder until after it occurred. (RPC 162).[6/]

The trial court denied relief on this issue. The Florida Supreme Court accepted the trial court's findings that "the state did not have knowledge of Gilford's statement to Bruns regarding Antone's ignorance of Cloud's murder until after it occurred and his after-the-fact participation in paying the money." App. 47a. The court found no actual suppression of favorable evidence by the state and stated, "The law is clear that in the absence of actual suppression of favorable evidence, the prosecution does not violate due process by denying discovery." App. 47a.

The district court ruled that it was required to accept the factual findings of the trial judge, citing 28 U.S.C. §2254 (d). Based upon those facts, the court found that no Brady violation occurred. App. 122a, 123a.

6/ Robert E. Bruns' entire transcript of testimony is reproduced in the Appendix, pages 237a-281a.

The Eleventh Circuit also rejected the claim, although members of the panel gave different reasons for doing so. The majority opinion ruled that petitioner had "received a full and fair hearing in state court and the record fairly supports the state judge's decision. The state courts found that there was no suppression of evidence by the prosecution. This finding concludes the issue under 28 U.S.C. §2254 (d) and Sumner v. Mata, 449 U.S. 539 . . .". App. 7a. Judge Kravitch agreed with the disposition of the majority but could not join "its conclusory analysis of this issue." Judge Kravitch found that both the state courts and the federal district court misapplied Brady. In a detailed analysis of Brady, the judge ruled that it was immaterial whether the State prosecutors knew of Bruns' statement. They undeniably were aware of him. The judge acknowledged that the state courts had found the failure to disclose Bruns name to be a violation of state discovery rules and stated "the state's knowledge or assessment of the exculpatory or nonexculpatory nature of the evidence is irrelevant to the analysis of the type of case before us. Only the State's knowledge of the existence of material information, exculpatory or not, is relevant." Citing, United States v. Agurs, 427 U.S. 97 (1976), the judge ruled that petitioner had made a specific request for this information in his demand for discovery and the State was required to comply with it. In spite of the violation, the judge found that the error was excusable, based on her analysis of the trial testimony of the petitioner and the arguments of his counsel and based, in part, on a conclusion that Bruns' testimony was cumulative. Additionally, Judge Kravitch found the district court and the majority misapplied the dictates of 28 U.S.C. §2254 (d) and Sumner v. Mata, 449 U.S. 539 (1981), by not giving reasons why the hearing was full and fair, and why the record supports the finding at issue, and in not evaluating whether petitioner established by convincing evidence that the Government did suppress evidence favorable to the Government. App. 10a-14a.

REASON FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE WRIT TO DETERMINE WHETHER THE PRINCIPLES OF PAYTON v. NEW YORK, SHOULD BE APPLIED RETROACTIVELY TO A CASE RAISING THE ISSUE FOR THE FIRST TIME ON COLLATERAL REVIEW OR WHETHER THE FEDERAL COURTS ARE BARRED UNDER STONE v. POWELL, FROM CONSIDERING THE PAYTON v. NEW YORK ISSUE.

The Court of Appeals for the Eleventh Circuit has ruled in petitioner's case that it is precluded from consideration of petitioner's Fourth Amendment claim based upon this Court's ruling in Stone v.Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). The Eleventh Circuit's ruling raises significant questions concerning the retroactive application of this Court's ruling in Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), to cases in which the issue is raised on collateral attack as well as the question of the application of the full and fair hearing requirements of Stone v. Powell. Petitioner submits that the Payton issue raised herein presents an important question of federal law, that this court has yet to answer. Antone v. Strickland, 706 F.2d 1534 (11th Cir. 1983); United States v. Johnson, ___ U.S. ___, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982).[7/]

Several courts within the various circuits have recently noted that the issue is one which remains to be settled by this Court. See, Scott v. Maggio, 695 F.2d 916 (5th Cir. 1983); United States v. Robinson, 690 F.2d 869 (11th Cir. 1982); Antone v. Strickland, supra; Cadena v. United States, 537 F.Supp. 384 (S.D.N.Y. 1982); McPhail v. Warden, Attica Correctional Facility, 539 F.Supp. 165 (S.D.N.Y. 1982).

Additionally, a review of various cases having a factual basis similar to the facts in petitioner's case indicate that there is a conflict on this issue within several of the circuit courts of appeals. In Crowell v. Zahradnick, 571 F.2d 1257 (4th Cir. 1977), which is an appeal of a denial of habeas corpus relief, the appellant argued that the admission of inculpatory statements at his trial violated his fourth amendment rights because the statements were a product of an illegal arrest. Based on the fact that petitioner's constitutional

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7/ See, Johnson, id. at p. 5944.

claim was raised for the first time in the federal courts of appeal from the dismissal of his petition for habeas corpus, the Fourth Circuit ruled that appellant had failed to exhaust State remedies and therefore the district court decision was affirmed. However, the Fourth Circuit gave no indication at all that Stone v. Powell would bar it from considering this Fourth Amendment claim. In fact, one judge in dissent urged that the court should consider the case on the merits.

In contrast to the Fourth Circuit's apparent willingness to review such a Fourth Amendment claim, several of the other circuits have announced decisions which indicate that the court of appeals is barred from review of such fourth amendment claims raised on collateral attack under the principles of Stone v. Powell, supra. In Morgan v. Estelle, 588 F.2d 934 (5th Cir. 1979), the petitioner filed a petition for writ of Habeas Corpus in the district court claiming that his arrest was illegal and that his confession was a result of his illegal arrest and should not have been admitted into evidence at his trial. The Fifth Circuit ruled that since petitioner had received a full opportunity to present his Fourth Amendment claim in state court, he was precluded from again asserting it in a habeas corpus petition under principles of Stone v. Powell, supra. (See also, Myers v. Rhay, 577 F.2d 504 (9th Cir. 1978), and Simmons v. Clemente, 552 F.2d 65 (2nd Cir. 1977), wherein the Ninth Circuit and Second Circuit, respectively, refused to grant habeas corpus review to Fourth Amendment claims, citing Stone v. Powell, supra.).

Although these cases predate this Court's decision in Payton and United States v. Johnson, supra, and are factually different from Payton, they do involve Fourth Amendment issues, similar to petitioner's being raised in habeas corpus proceedings. Although, Crowell v. Zahradnick, supra, does not expressly deal with the issue, petitioner believes that it is precedent for arguing a conflict within the circuits on this issue. This Court should grant Certiorari to finally resolve these issues.

In Payton v. New York, supra, this Court unequivocally established that "the Fourth Amendment to the United States

Constitution made applicable to the States by the Fourteenth Amendment to the United States Constitution . . . prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest." It is equally clear and undeniable that the task force of officers who arrested petitioner on February 25, 1976, did so in total violation of the Court's holding in Payton.

This Court's opinion in Payton was decided April 15, 1980. The Florida Supreme Court had denied petitioner's direct appeal on March 27, 1980. Rehearing was denied May 21, 1980. At the time of petitioner's arrest and during his appeal, Florida law allowed warrantless entries into homes to make felony arrests. No Payton type challenge was made by petitioner until he initiated collateral attack on his judgment and sentence.

Petitioner asserts that there are two aspects of this issue that this Court should review. The first is, the narrow issue of whether or not the Eleventh Circuit has improperly determined that this Court's ruling in Stone v. Powell precluded its review of the matter. In doing so, the court, of necessity, ruled that the petitioner had received a full and fair opportunity to litigate the issue in state court. Petitioner has maintained that this is simply not the case. Secondly, if, in fact, petitioner did receive a full and fair hearing, thereby bringing into play the principles of Stone v. Powell, this Court must decide whether those principles will preclude the federal courts on habeas corpus review, from reviewing an alleged Fourth Amendment violation under Payton v. New York, or whether petitioner's Payton claim may be retroactively applied even on collateral review and in spite of Stone v. Powell.

On the first point, petitioner has asserted that neither the district court nor the court of appeals are correct in this conclusion that petitioner had a full and fair opportunity to litigate his Fourth Amendment claim. Petitioner was foreclosed from litigating a Fourth Amendment issue in this case by the Florida Supreme Court's holding in State v.Perez, 277 So.2d 778 (Fla. 1973), which allowed the type of conduct that Payton later ruled illegal. Petitioner did challenge the voluntariness

of the statements by way of motion to suppress, however, no fourth amendment issue was raised. The reason for this is found in Perez v. State, supra. The rule in Perez had been law for several years in Florida prior to petitioner's arrest. See, Perez v. State, supra, at 781 (citing Reis v. State). Further, the Florida Supreme Court's review of applicable Federal law in its decision in Perez made it clear that Florida's position on this issue was not a justiciable issue in state courts.

The district court relied upon the fact that under Florida procedural rules, there was a mechanism for raising fourth amendment issues.[8/] Petitioner submits that the rule allowing for a motion to suppress simply cannot, under the circumstances here, be substituted or equated with the Stone v. Powell, requirement that petitioner have the opportunity for full consideration of the claim.[9/]

Numerous Circuit Courts have indicated a need for this Court to define the full and fair hearing requirement of Stone v. Powell; O'Berry v. Wainwright, supra, Petillo v. New Jersey, 562 F.2d 903 (3rd Cir. 1977). This Court should grant Certiorari to finally resolve the issue, cf., Shoemaker v. Riley, ___ U.S. ___, 103 S.Ct. 266 (1982) (dissent opinion by Justice White).

Should this Court rule that the principles of Stone v. Powell, are applicable under the circumstances of petitioner's case, the Court must also decide the difficult question of whether the petitioner is precluded under Stone v. Powell from asserting a violation of his Fourth Amendment rights under Payton v. New York, where the issue is raised on collateral attack. The issue regarding the retrospective application of Payton to claims arising on habeas corpus review, is ripe for review. United States v. Johnson, supra, at 102 S.Ct. at 2594.

8/ See, Memorandum of Decision. App. 117a-140a.

9/ Neither the trial court nor the Florida Supreme Court on direct appeal gave any consideration at all to the Fourth Amendment issue. When the issue was raised on collateral attack, the state courts ruled that Payton would not be applied retroactively.

In Johnson, id., the majority of this Court found that the history of retroactivity cases, at least those cases decided since Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), left no clear precedents to control the issues raised by the Court's decision in Payton v. New York. To resolve the retroactivity problem presented by Payton, the Court adopted Justice Harlan's approach suggested in his dissent in Desist v. United States, 394 U.S. 244, 89 S.Ct. 1030 (1969) and in a separate concurring opinion in Mackey v. United States, 401 U.S. 675, 91 S.Ct. 1171 (1971). Adopting that approach, the majority of the court then ruled that Payton and indeed all Fourth Amendment decisions of this Court would be applied retroactively to all convictions that were not yet final at the time the decision was rendered. Johnson, supra, at 2594.

The Court in Johnson, as Justice Harlan did in Desist, supra, and Mackey, supra, recognized that the determination of the retrospective application of the new rule of law to habeas corpus proceedings presented substantially different and difficult questions. Under Justice Harlan's approach, the issue is to be decided based upon an inquiry into the purposes of habeas relief. Under Stone v. Powell, supra, additional considerations come into play when the issue sought to be raised involves fourth amendment issues raised on collateral attack. Additionally, whereas, Justice Harlan was exploring the purpose of the writ of habeas corpus as defined by this Court's decision in Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822 (1963), this Court must examine the matter with an eye toward the narrowed purpose of the habeas corpus writ under Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977).

Petitioner believes that those factors which led to the Court applying Payton to those convictions not yet final, require that Payton be applied retroactively to his case even though the issue was first raised on collateral attack. Petitioner's conviction had been affirmed by the Florida Supreme Court, but was not yet final under Linkletter v. Walker, supra, at 622, n.5. Those considerations of finality and the purpose of the Exclusionary rule which underlie the Court's ruling

in Stone v. Powell, supra, should not apply to petitioner's case since his conviction had not reached a stage that could be labeled final. Petitioner no less than other similarly situated persons at the time of Payton, should not be barred from asserting either by direct appeal or habeas corpus petition, a clear constitutional violation.[10/] Petitioner believes that the resolution of the issue as it relates to his case, may well lay somewhere in the middle of a final resolution of the overall issue. However, petitioner believes that the Court should resolve these difficult issues by granting the writ and allowing full briefing on the matters raised.

II. THE COURT SHOULD GRANT THE WRIT TO DETERMINE WHETHER PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS CAPITAL TRIAL BY COUNSEL'S FAILURE TO PRESENT EVIDENCE IN MITIGATION, BY COUNSEL'S FAILURE TO PRESENT OTHER MITIGATING CIRCUMSTANCES OUTSIDE THE STATUTORILY PRESCRIBED FACTORS, BY COUNSEL'S FAILURE TO ADEQUATELY OR EFFECTIVELY PRESENT ARGUMENT DURING THE PENALTY PHASE OR BY COUNSEL'S FAILURE TO REQUEST SPECIAL JURY INSTRUCTIONS TO CLEAR UP DEFICIENCIES IN THE STANDARD JURY INSTRUCTIONS.

This Court has repeatedly affirmed that which it stated in Woodson v. North Carolina, 428 U.S. 280, 304 (1976), that:

> We believe that in capital cases, the fundamental respect for humanity underlying the Eighth Amendment, requires consideration of the character and records of the individual offender and the circumstances of the particular offense as a constitutionally indispensible part of the process of inflicting the penalty of death.

See, Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Eddings v. Oklahoma, ___ U.S. ___, 102 S.Ct. 869 (1982); Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733 (1983). Petitioner's trial counsel failed to adequately develop or present evidence in mitigation at his sentencing hearing. Inexplicably, counsel did not put on the testimony of a single witness on behalf of the petitioner. The record of the sentencing hearing which occurred immediately upon the conclusion of the guilt phase

10/ Questions regarding procedural default under this Court's holding in Wainwright v. Sykes, supra, were not addressed by the lower courts and are not raised here.

reflects a complete lack of preparation and presentation of relevant mitigation. The prosecution introduced the only evidence admitted during the sentencing phase. This evidence consisted of petitioner's file from the Florida Department of Corrections, a file compiled during petitioner's previous incarceration for Robbery. The file was introduced and effectively argued by the prosecution to establish aggravating factors and to disprove mitigating factors. Trial counsel essentially stipulated the file into evidence. Apparently, this was done so that he could point out in argument, that petitioner had previously had brain surgery. This argument rang hollow during arguments however, as there was no way for counsel to draw any conclusions from the fact of surgery so that mitigation could be established.

The record is totally devoid of any attempt by counsel to establish a record in support of mitigation. Not even family members were called to talk about the petitioner's personal, familial and employment background.[11/] This evidence is clearly admissible under Florida and Federal law as non-statutory mitigating circumstances.

Trial counsel relied exclusively on closing argument to convince the jury that sufficient mitigating circumstances existed to warrant a recommendation of life. The prosecution's argument during the penalty phase presented the issue as one of counting aggravating versus mitigating factors. Clearly, it is not under Florida law, Dixon v. State, 283 So.2d 1 (Fla. 1973); Proffitt v. Florida, supra. Yet, trial counsel did nothing to counter this highly misleading argument. Instead

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11/ Judge Kravitch, in a special concurring opinion, denied relief on this issue in part because of the failure of habeas petitioner to present evidence which would establish how this ineffectiveness disadvantaged petitioner under Washington v. Strickland, 693 F.2d 1243 (5th Cir. Unit B, 1982) (en banc). However, the record is clear that petitioner asked for additional time prior to the state court hearing so that counsel during collateral proceedings could take discovery and prepare and present evidence in support of the various issues. The trial court denied the request. Petitioner still maintains that he has been denied a full and fair hearing on this and other issues and that if given the opportunity, mitigating evidence could be established. Antone v. Strickland, supra, App. 16a.

trial counsel, showing a total lack of understanding of the law relating to mitigation, confined his argument to the statutory factors. Trial counsel never once informed the jury that the question of life or death was to be a weighing process rather than a counting process. Not once did trial counsel argue outside the statutory mitigating factors.[12/] Having failed to establish any factual basis in support of mitigation, counsel's argument was woefully inadequate to convince the jury on this issue.

Finally, counsel failed to request Special Jury Instructions which would have cleared up deficiencies in the Florida Standard Jury Instructions in use at his trial. Not only did both counsel indicate in their arguments that the jury was limited in its consideration of mitigating factors to those contained in the Statute, but the Standard Instructions also impliedly indicated this. For instance, the jury was never informed by the court that it could consider any other relevant aspect of petitioner's character or circumstances of the offense. Clearly, that was and to this day, remains the law. Lockett v. Ohio, supra. Trial counsel did nothing to assure that this principle was before the jury.

A reading of the entire penalty proceeding establishes a totally inadequate performance by trial counsel. It is also evident, that counsel's failure to prepare and present evidence in mitigation helped procure petitioner's death sentence. Both the trial judge and the Florida Supreme Court relied heavily on the finding of no mitigation to support the imposition of death. Subsequent challenges to the death penalty have also been thwarted by the judicial findings of lack of mitigating circumstances.

12/ Judge Kravitch found that at least one non-statutory mitigating factor had been argued. That factor dealt with the disparity of sentence between the co-defendant Haskew and the suggested death sentence for petitioner. App. 16a. The disparity of sentence was argued to the jury but only in an attempt to establish one of the statutory mitigating factors. It is evident that trial counsel was not even aware that he could argue any relevant aspect of petitioner's character or circumstance of the offense, regardless of the statutory list of mitigating factors. It is the total lack of understanding relating to the presentation of mitigation that petitioner objects to.

Finally, petitioner asserts that this is an issue of great importance to the federal judicial system and one which requires a decision from this Court. The Court has granted certiorari in two cases presenting the question of the standards to be applied in determining effective assistance of counsel both at an ordinary criminal trial, United States v. Cronic, No. 82-660, cert. granted, ___ U.S. ___, 51 U.S.L.W. 3611 (Feb. 22, 1983), and at the sentencing phase of a capital case. Strickland v. Washington, No. 82-1554, cert. granted, ___ U.S. ___, 103 S.Ct. 2451, 77 L.Ed.2d 1332 (June 6, 1983). The Court should grant the writ and determine whether petitioner was denied the effective assistance of counsel in light of the standards to be set in Cronic and Strickland v. Washington.

III. THE COURT SHOULD GRANT THE WRIT TO DETERMINE WHETHER IN THE APPLICATION OF THE ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL AGGRAVATING FACTOR TO PETITIONER'S CASE, THE STATE OF FLORIDA HAS USED SUCH A VAGUE AND OVERBROAD CONSTRUCTION OF THE FACTOR THAT THE EIGHTH AND FOURTEENTH AMENDMENTS ARE VIOLATED.

In imposing the sentence of death on the petitioner, the trial judge found four statutory aggravating factors and no mitigating factors. In significant part, the court based the sentence upon its finding the crime was "especially heinous, atrocious, and cruel". In reviewing the death sentence, the Florida Supreme Court affirmed the judgment and sentence, but stated, "Because of our recent decisions, there may be a question whether this is an appropriate aggravating circumstance." App. 32a.

Petitioner has repeatedly challenged both the application of the factor to his case and the vague, overbroad and outright inconsistent judicial construction given to this factor by the Florida Supreme Court. The lower federal courts have failed to address this issue. Although the issue was briefed in these terms, the Eleventh Circuit, reviewed the matter as not involving a question of an unconstitutionally vague statutory factor, but instead involving only a question of the improper application of a statutory aggravating factor on non-constitutional grounds. App. 6a. Contrary to this holding by the Eleventh Circuit,

the question raised deals precisely with the application of an unconstitutionally vague and overbroad aggravating factor.

As petitioner will establish, the "especially heinous, atrocious and cruel" aggravating factor was improperly applied to his case. This occurred because the Florida Supreme Court's inconsistent interpretation of the meaning and scope of the factor has resulted in a vague and overbroad aggravating factor that might literally apply to every single premeditated murder committed in Florida.

This Court has recently reaffirmed that it is a fundamental requirement that a state's "aggravating factors" and indeed each statutory aggravating factor must satisfy constitutional standards as set out in Furman v. Georgia, 408 U.S. 241, 92 S.Ct. 2726 (1972). The reason for this is the recognition that a system "could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found in Furman could occur." (Citing Gregg v. Georgia, 428 U.S. at 195 n. 46). Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733, 2742 (1983).

In order to avoid this constitutional defect, this Court stated;

> An aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. Zant v. Stephens, id., at 2742, 2743.

Florida's "heinous, atrocious and cruel" aggravating factor as construed and applied does not satisfy constitutional standards.

The "especially heinous, atrocious and cruel" factor was inappropriately applied to petitioner. In upholding the constitutionality of Florida's capital punishment scheme, this Court accepted the factor on the basis of the limited definition given to the factor by the Florida Supreme Court in State v. Dixon, 283 So2d 1 (Fla. 1973). Proffitt v. Florida, 428 U.S. 242 (1976). In Dixon, the court stated,

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering of others.

> What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies . . .

By this constitutionally acceptable definition, the aggravating factor did not apply to petitioner's case. Here the victim died quickly as the result of several gunshot wounds. There was no evidence of torture, or the extraordinary infliction of pain or suffering upon the victim. See, Cooper v. State, 336 So.2d 1133 (Fla. 1976); Fleming v. State, 374 So.2d 954 (Fla. 1979); Kampff v. State, 371 So.2d 1007 (Fla. 1979). Compare with, Gardner v. State, 313 So.2d 675 (Fla. 1975); Adams v. State, 412 So.2d 850 (Fla. 1982); Thompson v. State, 389 So.2d 197 (Fla. 1980).

The evidence in this case establishes a homicide that is not "accompanied by such additional acts as to set the crime apart from the norm of capital felonies." See, Dixon, supra. Similar to this Court's holding in Godfrey v. Georgia, 446 U.S. 420 (1980), here there is no 'principaled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." id at 433.

To support this aggravating factor, the trial judge simply stated, "The premeditated murder of Det. Sgt. Cloud was particularly a heinous, cruel and vicious crime." No where is the Dixon standard acknowledged. The fact of premeditation is found or presumed to be present[13/] in every first degree murder under Florida law. If premeditation in and of itself is sufficient to make the murder "especially heinous, atrocious or cruel," then virtually every first degree murder would be eligible for the death penalty under this aggravating factor.

This is not simply a problem of the trial judge misapplying

13/ First degree murder is committed either (a) from a "premeditated design to effect the death of another" or (b) by committing the murder during the commission of certain enumerated felonies, i.e., felony murder. See, Chapter 782.04(1) Florida Statute 1975. Under Florida law of felony murder premeditation or "malice aforethought" is supplied by the commission of the felony. Adams v. State, 341 So.2d 765 (Fla. 1976); Jacobs v. State, 396 So.2d 1113 (Fla. 1981). Thus premeditation exists either actually or constructively in every first degree murder.

a factor. A review of Florida Supreme Court decisions dealing with this type of finding shows an indefensible inconsistency that has left this factor so vague and overbroad that it no longer acts to channel jury discretion.[14/]

The "especially heinous, atrocious and cruel" aggravating factor has generated a volume of confusing and unintelligible law in other factual contexts as well.[15/]

14/ On the relationship between premeditation and this aggravating factor, the Court has not reached consistent results. Compare, Harvard v. State, 414 So.2d 1032, 1033, 1036 (Fla. 1982) (defendant "stalked" and harassed his ex-wife after their separation; homicide itself was committed by a single shotgun blast at ex-wife while she was in a car, death was instantaneous, with no evidence that she was aware of danger when killed; trial court's finding of "heinous, atrocious or cruel" circumstance based on fact that crime was premeditated, calculated and "a cold-blooded execution" upheld) with Kampff v. State, supra, 371 So.2d at 1008, 1010 (defendant and wife were separated three years; defendant harassed her throughout the period; the homicide was committed by five shots at victim in a store, three of which struck and killed her; held, "heinous, atrocious or cruel" circumstance was not applicable). Compare, Vaught v. State, 410 So.2d 147, 148, 151 (Fla. 1982) (robbery victim exposed defendant's face, defendant shot him five times; held, "heinous, atrocious or cruel" circumstance was applicable because the murder was "inflicted in a cold, calculating, or 'execution-style' fashion") with, Menendez v. State, 368 So.2d 1278, 1282 (Fla. 1979) (robbery victim shot twice while arms were raised in submissive position; held, "there is nothing to set this execution murder 'apart from the norm of capital felonies'"). Compare, McCray v. State, 416 So.2d 804, 805, 807 (Fla. 1982) (defendant, angered by victim's actions during robbery, approached him and said, "This is for you motherf---er", then shot him three times; held, "heinous, atrocious or cruel" circumstance was not applicable); with Johnson v. State, 393 So.2d 1069, 1071, 1073, 1074 (Fla. 1980) (defendant angered by fact that victim had shot at him during robbery, walked up to victim when victim ran out of bullets and said, "You think you're a smart son-of-a-bitch, don't you?" then shot him once in the chest; held, "heinous, atrocious or cruel" applicable to this "execution murder.").

15/ In some cases with factual basis that seem to fall squarely within the statutory definition, the Florida Supreme Court has nonetheless rejected the factor. For example, see, Swan v. State, 322 So.2d 485 (Fla. 1975), where the victim was found "in a semiconscious condition on the floor of the home, badly bruised and beaten. Her hands, neck and left foot were tied so that any efforts she might have made to free herself could have choked her to death." She was tied up and her mouth was gagged. As a result of the severe beating, she died. The trial court found the murder "outrageously wicked, vile, atrocious, cruel and heinous." The Florida Supreme Court reversed the sentence of death; see, Halliwell v. State, 323 So.2d 557 (1975), where the defendant savagely and repeatedly beat the victim with a nineteen inch breaker bar, thereby causing the death of the victim. After killing the victim, the defendant dismembered the body and concealed the pieces to be later disposed of. The trial court found the murder heinous, atrocious and cruel. The Florida Supreme Court reduced the death sentence to life imprisonment.

In other cases, with seemingly identical facts, the Florida Supreme Court has provided inconsistent rulings. For instance,

In some cases, such as petitioner's, the Florida Supreme Court appears incapable of making up its own mind on the issue. A good illustration of this is Raulerson v. State. In Raulerson, a police officer who was investigating a robbery in progess was shot and killed by the defendant. The trial court found the crime heinous, atrocious and cruel. The death sentence and in particular, this factor, was upheld on direct appeal to the Florida Supreme Court. Raulerson v. State, 358 So.2d 826 (Fla. 1978). Raulerson subsequently sought post-conviction relief. When the case was again reviewed by the Florida Supreme Court, the court changed its collective mind and its earlier ruling and found that the crime was not heinous, atrocious or cruel. Raulerson v. State, 420 So.2d 567 (Fla. 1982).

The heinous, atrocious and cruel aggravating factor, no longer can satisfy the standards that this Court has established for aggravating factors. Furman v. Georgia, supra; Gregg v. Georgia, supra; Zant v. Stephens, supra. As so construed, it provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases. See, Proffitt v. Florida, 428 U.S. 242, at 256.

Petitioner submits that the application of this unconstitutionally vague aggravating factor to his case resulted in prejudice when it is considered in light of his earlier argument that there existed mitigating circumstances in his case, which should have been presented to the trial jury and judge. Under Florida's death penalty scheme, the sentencer must weigh the aggravating and mitigating factors in arriving on a sentence. See, Proffitt v. Florida, supra at 249-251. Where as here, the sentencer

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15/ continued. Compare, Riley v. State, 366 So.2d 19 (Fla. 1979), where defendant and another entered a store to rob the owner. Three persons were inside the store. All three were threatened with guns, bound and gagged and forced to lie on the floor. They then were each shot in the head. Two of the victims were killed. Although the trial judge found the murder heinous, atrocious and cruel, the Florida Supreme Court rejected the finding and remanded the case for resentencing; with Gibson v. State, 351 So.2d 948 (Fla. 1977), where the defendant and another by a prearranged plan, robbed two sailors who were out for a night on the town. One victim begged not be shot and the defendant shot him twice in the head, the other person was also shot but survived. The Florida Supreme Court accepted the trial court's finding that the murder was heinous, atrocious and cruel and affirmed the sentence of death.

relied upon the unconstitutionally vague factor, the sentence should be overturned, as there is no way to determine from judicial hindsight, what part the unconstitutional factor played in the balancing process which led to the sentence of death.

Petitioner is not unmindful of this Court's rulings in Barclay v. Florida, ___ U.S. ___, 103 S.Ct. 3418 (1983) or Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733 (1983), however, petitioner does not believe either case is controlling here. In the Barclay case, the issue concerned the improper application of non-statutory aggravating factors. The question in petitioner's case is the improper application of an unconstitutionally vague statutory aggravating factor. Petitioner's case thus is more closely related to Zant v. Stephens, id.

The Court in Zant v. Stephens, id at 2750, specifically stated;

> That in deciding this case we do not express an opinion concerning the possible significance of a holding that a particular aggravating circumstance is invalid under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the sentence of death.

That is precisely the function which the trial judge must undertake under Florida law.

Further, it should be no consolation that Florida procedure requires automatic review. On this issue, the Florida Supreme Court's record reveals that it has been incapable of even arriving at a consistent application of the especially heinous, atrocious and cruel factor. Contrary to the majority conclusion in Barclay, supra, petitioner asserts that the Florida Supreme Court cannot "examine the balance struck by the trial judge and decide that the elimination of improperly considered aggravating circumstances could not possibly affect the balance." Barclay, supra at 3445.

Florida's statutory death penalty scheme is infected by an unconstitutionally vague and overbroad aggravating factor. The absolute pervasiveness of this factor when coupled with the Florida Supreme Court's inability to effectively limit its construction requires that a death sentence imposed in reliance

IV. WHETHER THE FAILURE OF THE STATE TO COMPLY WITH THE REQUIREMENTS OF BRADY v. MARYLAND, AND UNITED STATES v. AGURS, BY FAILING TO DISCLOSE THE EXISTENCE OF A RELEVANT WITNESS THEREBY PRECLUDING PETITIONER FROM HAVING A WITNESS TO TESTIFY IN THE PENALTY PHASE OF HIS CAPITAL TRIAL AS TO THE CIRCUMSTANCES OF THE OFFENSE DENIED PETITIONER HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

As set out above, the State was aware of the existence of one Robert Bruns at least six months prior to petitioner's trial. Through a deliberate decision of the prosecution, the witness's name was not disclosed to petitioner's trial counsel. Bruns possessed relevant information regarding petitioner's position in crime scheme.16/

The Court in Brady v. Maryland, 373 U.S. 220, 83 S.Ct. 1194 (1963), held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment . . ." id at 87.

In the Eleventh Circuit, the majority found that the State courts had held an evidentiary hearing and concluded that there had been no actual suppression of favorable evidence by the State. The majority agreed with the district court that petitioner could not overcome the presumption of correctness in 28 U.S.C. §2254 (d) and that the matter was concluded under 2254 (d) and Sumner v. Mata, 449 U.S. 539 (1981).

Petitioner submits that the majority totally misapplied §2254 (d) and Sumner v. Mata, id. Petitioner agrees with the analysis of the issue made by Judge Kravitch in her special concurring opinion, but believes that the conclusions drawn therein are incorrect. In brief, Judge Kravitch found that the state courts and the district court had misapplied Brady in that they had relied upon a finding that the prosecutor had not had knowledge of the specific contents of the witness's statement and that therefor there was no knowing suppression of exculpatory evidence. However, applying Brady and United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392 (1976), Judge Kravitch

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16/ The transcript of Bruns' testimony at the hearing on petitioner's motion for post-conviction relief is set out in full in the Appendix. App. 237a-281a.

concluded that the prosecutor's culpability or knowledge of the exculpatory nature of the statement was irrelevant because there had, in fact, been a specific demand by the petitioner for this witness and the substance of the witness's statement. Applying the principles of Agurs, the court concluded that this type of Brady violation had occurred in Petitioner's case. In spite of this finding that Brady was violated, Judge Kravitch ruled that the failure to disclose was excusable under her analysis of the defense put on by petitioner both in the guilt and penalty phase of his trial.

Petitioner believes that Judge Kravitch has correctly analyzed the facts viz a viz §2254 (d) and Sumner v. Mata, and has correctly determined that the majority misapplied 28 U.S.C. §2254 (d) and Sumner v. Mata, supra, by holding that the issue is "concluded" because petitioner was unable to overcome the presumption of correctness. However, neither §2254 (d) nor Sumner v. Mata, supra, precluded the court from deciding the legal issue raised by the petitioner, and where as here, the state courts have misapplied the federal constitutional law, the federal courts must make their own independent analysis of the proper application of the constitution or the law to the facts in question. Sumner v. Mata, 449 U.S. at 543, 544.

While petitioner accepts Judge Kravitch's findings with regards to the Brady violation, petitioner disagrees with the conclusion that it is excusable. Per Agurs, supra, where it has been determined that a Brady violation exists and that a defendant has made a specific demand for exculpatory evidence, the issue becomes whether the "suppressed evidence might have affected the outcome of the trial." Agurs, 427 U.S. at 104. In Brady, the Court made it clear that its decision applied not only to nondisclosures affecting the guilt phase of the trial and but also to those nondisclosures affecting the punishment phase of the trial as well.

Petitioner has acknowledged that because of questions regarding the admissibility of Bruns' statement during the guilt phase, the nondisclosure had no bearing. However, it is clear that Bruns' statement, albeit hearsay, was admissible during the

penalty phase of petitioner's trial and could have been offered as substantial mitigating evidence had the petitioner known of the existence of the witness.

In determining whether this witness and evidence might have affected the outcome of the penalty phase of the trial the Court must be guided by its rulings in Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978 (1976); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978) and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869 (1982).

In Lockett, id at 604, the Court concluded that;

> The Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Thus, in Lockett, the Court struck down an Ohio statute which it determined precluded the sentencer from making these considerations.

In Eddings v. Oklahoma, supra, the Court, citing Lockett, overturned a sentence of death where the trial judge, ruled as a matter of law, that he was precluded from considering relevant mitigating evidence proffered by the appellant. As the Court stated, "The sentencer and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But, they may not give it no weight by excluding such evidence from their consideration."

Petitioner questions whether it is any less a violation of the Eighth and Fourteenth Amendments where the State of Florida, by the act of its prosecutor, has effectively precluded him from proffering a witness and evidence in mitigation of sentence. Petitioner submits it is not. By this act, the sentencer is just as surely deprived of consideration of a relevant mitigating circumstance of the offense, as it is when a statute precludes such consideration, or the court on its own, as a matter of law, declines to give any consideration.

Petitioner further submits that if it is such an Eighth and Fourteenth Amendment violation, then it is per se prejudicial

and the sentence of death must be reversed. It is not for the federal courts to speculate, as Judge Kravitch did in denying petitioner relief, that this violation would have had no bearing on the outcome of the penalty phase. As this Court stated in Eddings v. Oklahoma, supra, "On remand the state courts must consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances. We do not weigh the evidence for them."

Petitioner's sentence was imposed through a process which denied the sentencer consideration of a relevant mitigating witness. Under the principles of Woodson v. North Carolina, supra; Lockett v. Ohio, supra; and Eddings v. Oklahoma, supra, the petitioner's Eighth and Fourteenth Amendment rights have been violated. If the Court's previous admonitions regarding reliability in capital sentencing are to have any meaning, the writ should be granted.

CONCLUSION

For the reasons expressed herein, the petition for a writ of certiorari should be granted.

DATED this 24 day of October, 1983.

Respectfully submitted,

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No. 83-5644

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

ANTHONY ANTONE,

Petitioner,

-v-

CHARLES G. STRICKLAND, JR., Superintendent, Florida State Prison, LOUIE L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation, State of Florida; JIM SMITH, Attorney General, State of Florida,

Respondents.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, ANTHONY ANTONE, who is now imprisoned in the custody of the Florida Department of Corrections, asks leave to file the accompanying Petition for Writ of Certiorari without pre-payment of costs and to proceed in forma pauperis pursuant to Rule 46 of the Rules of this Court. Petitioner has proceeded in forma pauperis at all times in the state courts below. By separate mailing, Petitioner will provide this Court with an affidavit in substantially the form presecribed by Federal Rules of Appellate Procedure, Form 4, and the Rules of this Court, establishing his indigency.

Respectfully submitted,

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BY: _____
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BY: _____
PATRICK DOHERTY, ESQUIRE

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IN THE

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Respondents.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED ON PETITION FOR A WRIT OF CERTIORARI IN FORMA PAUPERIS

I, ANTHONY ANTONE, being first duly sworn, depose and say that I am the Petitioner in the above-entitled cause; that in support of my motion to proceed on Petition for a Writ of Certiorari without being required to prepay fees, costs or given security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that at all stages of these proceedings, I have been allowed to proceed in forma pauperis.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the Petition for a Writ of Certiorari are true.

1. Are you presently employed? No.

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   Incarcerated for the last eight years.

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? no.

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? no.

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? no

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support None and state your relationship to those persons.

6. I am a death-sentenced prisoner confined to Florida State Prison, Starke, Florida. I have no other source of income nor property as set out herein.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Anthony Antone
ANTHONY ANTONE, Petitioner

Subscribed and sworn to before me this 24 day of October, 1983.

J. W. Warren
NOTARY PUBLIC
My Commission Expires: [illegible]